court of equity should distinguish such a case from one where the written contract represents the agreement of the parties and the error occurs as to its legal effect.[16] (10) Two states have succeeded in drawing a metaphysical distinction between mistake and ignorance of law, allowing relief in the former case only.[17] In all other cases — if any — the maxim remains intact.

The continued lack of frankness on the part of the courts, obvious from the presence of this formidable array of exceptions, makes it clear that relief from the confusion can hardly be expected from that source. Nor are attempts by writers to provide criteria for reconciling old cases and for granting relief in new ones of much value. Such criteria have in the past been attempted,[18] and those which have not been wholly discarded have served only to establish additional exceptions and thus to increase further the confusion. In fact, no criterion is possible, much less, desirable. It can result only in an effort to save the last vestige of a decrepit doctrine unsupportable on principle, and unjust in its operation. Legislative action, abolishing the maxim and establishing a mistake of law on an equal footing with one of fact, seems to be the only solution. Yet relief even from that source is unhoped for, if the judiciary adopts the attitude recently taken toward such legislation in Oklahoma.[19] There the court, by construing statutes less narrowly, could have given them the effect of banishing the maxim entirely from its operation in civil cases, where it properly has no application; but instead, the court stood strictly on precedent and practically negatived the true purpose of the legislation.[20] However, statutes more clearly defined in terms and scope than those thus far passed [21] would make the recurrence of such judicial obstruction impossible.

RECENT CASES

ADMIRALTY — PRACTICE — SUIT AGAINST NONRESIDENT ENEMY ALIEN. — A British company sued an Austrian corporation *in personam* in a United States admiralty court after England declared war on Austria. The defendant appeared and gave a bond releasing an attachment placed on one of its ships; but the District Court dismissed the libel, and by the time the case reached the Supreme Court, the United States also had declared war on Austria, and had prohibited all intercourse with Austrian subjects. The supervening

129 Pac. 28; Good Milking Machine Co. *v.* Galloway, 168 Ia. 550, 150 N. W. 710; Philippine Sugar, etc. Co. *v.* Philippine Islands, 247 U. S. 385.

[16] See 1 STORY, EQUITY JURISPRUDENCE, 13 ed., 113, note.

[17] Culbreath *v.* Culbreath, 7 Ga. 64; Lawrence *v.* Beaubien, 2 Bailey (S. C.), 623.

[18] See Cooper *v.* Phibbs, *supra;* KERR, FRAUD AND MISTAKE, 3 ed., 431; STORY, EQUITY JURISPRUDENCE, 13 ed., § 121, 1 L. QUART. REV. 298; 17 CENT. L. JOUR. 12; 18 CENT. L. JOUR. 7; 2 POMEROY, EQUITY, 3 ed., § 849; 5 COL. L. REV. 366.

[19] Campbell *v.* Newman, 51 Okla. 121, 151 Pac. 602.

[20] But see Gregory *v.* Clabrough's Executors, 129 Cal. 475, 62 Pac. 72. The statutes in California and Oklahoma are the same, but the California court construed them as including recovery for money paid by mistake as well as reformation of contracts.

[21] See CAL. CIVIL CODE, § 1578; N. DAK. CIV. CODE, 1913, § 5855; SO. DAK. CIV. CODE, § 1207; OKLA. REV. LAWS, 1910, § 909; MONT. REV. CODE, 1907, § 4984.

charges in fact and in law were considered by the Supreme Court as is the practice in an admiralty case. *Held*, that the case be remanded for further proceedings, but no action, except to preserve the security, to be taken until the defendant can present his defense adequately. *Watts, Watts & Co., Ltd.* v. *Unione Austriaca di Navigazione, etc.*, U. S. Sup. Ct. Off., October Term (1918), No. 25.

Since the proceeding is *in personam*, the Austrian corporation is to be treated as an enemy alien defendant, for the admiralty doctrine that a personal defendant is a claimant is applicable only to proceedings *in rem*, where the right to appear is based on a claim to the property. See BENEDICT, ADMIRALTY, 4 ed., § 296. Where a suit against a nonresident alien enemy is entertained, he is permitted to defend. *Seymour* v. *Bailey*, 66 Ill. 288 (1872); *McVeigh* v. *United States*, 11 Wall. (U. S.) 259 (1870); *Robinson* v. *Continental Insurance Co.*, [1915] 1 K. B. 155. Still, if the defense cannot be adequately presented it is not fatal, where there has been an appearance or the proceeding is *quasi-in-rem*. *Porter* v. *Freudenberg*, [1915] 1 K. B. 857; *Dorsey* v. *Dorsey*, 30 Md. 522 (1869). See 31 HARV. L. REV. 471, 475. The delicate problem is to afford the plaintiff, an ally, as effective a remedy as he would have if suing a loyal citizen, since otherwise the enemy is really protected; and yet allow the defendant a fair hearing. The solution is often in the form of a postponement within the discretion of the court. See *Porter* v. *Freudenberg*, [1915] 1 K. B. 857, 892; *Robinson* v. *Continental Insurance Co.*, [1915] 1 K. B. 155, 162. When the plaintiff is amply protected by a bond such a practice is commendable, but it might be a hardship on the plaintiff to insist that he shall wait. See *In re Amsinck's Estate*, 169 N. Y. Supp. 336. The more flexible practice of allowing the lower court to grant a continuance in court in its discretion is to be favored, especially in admiralty. See *The Kaiser Wilhelm II*, 246 Fed. 786.

BANKRUPTCY — PREFERENCES — PAYMENT TO THE HOLDER OF A NOTE AS A PREFERENCE TO THE INDORSER OR SURETY. — Within four months of the petition to have him adjudged a bankrupt, the maker of a note paid the holder. His trustee in bankruptcy sues the accommodation indorser alleging the payment was a preference to the indorser which he had reasonable cause to believe would be effected. *Held*, on a motion to dismiss the bill, the trustee may recover. *Cohen* v. *Goldman*, 42 Am. B. Rep. 85 (C. C. A., 1st Circ.).

There is no question that a surety or indorser is a creditor of the principal debtor. *Stern* v. *Paper*, 183 Fed. 228. It is also clear that a creditor may receive a preference by a transfer to a third person. *Western Timber Co.* v. *Brown*, 129 Fed. 728. If the surety solicits the payment of a note by the maker to the holder, many courts compel the surety to surrender that amount. *Kobusch* v. *Hand*, 156 Fed. 660; *In re Sanderson*, 149 Fed. 273; *Brown* v. *Streicher*, 177 Fed. 473; *Atherton* v. *Emerson*, 199 Mass. 199, 85 N. E. 530. The surety has been compelled, as in the principal case, to surrender such payment even when he did not participate in the transfer. *Paper* v. *Stern*, 198 Fed. 642. *Contra*, *Reber* v. *Shulman*, 183 Fed. 564. As a necessary construction of the Bankruptcy Act, the view of the principal case is sound, though one's first impression is that it is severe on the surety. Generally, the holder of a note, who has surrendered a payment by the maker as a fraudulent preference, may still hold the sureties. *Harner* v. *Batford*, 35 Ohio St. 113; *Hooker* v. *Blount*, 44 Tex. Civ. App. 162, 97 S. W. 1083; *Perry* v. *Van Norden Trust Co.*, 118 App. Div. 288, 103 N. Y. Supp. 543. *Contra*, *Re Ayers*, 6 Biss. 48. The surety may, however, prove in bankruptcy his right of subrogation. BANKRUPTCY ACT, § 57 *i*. If the holder of the note retains the payment, the surety suffers no greater hardship by surrendering that amount, for he now may prove in bankruptcy his claim for reimbursement. BANKRUPTCY ACT, § 57 *g*; *Keppel* v. *Tiffin Bank*, 197 U. S. 356.